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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

VERIZON CALIFORNIA INC., et al.,

Plaintiffs,

v.

ONLINENIC, INC.,

Defendant.

Case Number C 08-2832 JF (RS)

**ORDER¹ GRANTING IN PART
AND DENYING IN PART
MOTIONS FOR CONTEMPT
SANCTIONS AND FOR RELIEF
FROM JUDGMENT**

[re: doc. nos. 60 & 113]

Plaintiffs Verizon California, Inc., Verizon Trademark Services LLC, and Verizon Licensing Company (collectively, “Verizon”) move for the imposition of civil contempt sanctions against Defendant OnlineNIC, Inc. (“OnlineNIC”) for its alleged violations of the Modified Injunction and Receiver Order entered by this Court on May 13, 2009.² Verizon

¹ This disposition is not designated for publication in the official reports.

² Verizon filed its first motion for contempt on March 13, 2009, arguing that OnlineNIC had violated the terms of an injunction entered by the Court on March 11, 2009. The Court held a hearing on the motion on March 23, 2009, and denied the request for sanctions in an oral ruling. On April 8, 2009, Verizon moved for reconsideration of the denial of contempt sanctions, citing new evidence of OnlineNIC’s alleged violations of the Court’s initial injunction. Verizon

1 alleges eleven counts of contempt, on the basis of which it seeks monetary sanctions and
 2 recovery of its reasonable attorneys' fees and costs. In addition, noting that the Court for the last
 3 five months has held OnlineNIC's motion for relief from judgment under submission for the
 4 express purpose of evaluating OnlineNIC's general credibility and its intent to engage with the
 5 litigation process, Verizon now asks the Court to deny the motion for relief from judgment.

6 Having undertaken a careful review of the record, the Court finds that OnlineNIC has
 7 committed multiple sanctionable violations of the Court's orders. In addition, after evaluating
 8 not only the arguments presented in connection with OnlineNIC's motion for relief from
 9 judgment, but the subsequent course of this litigation, the Court has determined that there is no
 10 basis for setting aside the default judgment. However, because it is beyond dispute that
 11 OnlineNIC, albeit belatedly and at times in bad faith, has sought to participate in this litigation,
 12 the Court will require Verizon to prove up its damages in the context of the present adversarial
 13 proceedings, and will modify the judgment accordingly.

14 **I. MOTION FOR CONTEMPT SANCTIONS**

15 **A. Allegations**

16 Verizon claims that OnlineNIC is guilty of the following violations of the Modified
 17 Injunction:

- 18 1. Failure to provide a copy of the Modified Injunction to ICANN by May 14, 2009
- 19 2. Failure to provide a copy of the Modified Injunction to VeriSign by May 14, 2009

20
 21 renoticed the motion on May 8, 2009, a hearing on the motion was held on June 12, 2009, and
 the Court granted Verizon's request for sanctions on June 23, 2009.

22 On June 17, 2009, Verizon filed a second motion for contempt, arguing that OnlineNIC
 23 had violated the terms of the Modified Injunction and the Receiver Order. A hearing on that
 24 motion was held on July 6, 2009. As the Court noted at the hearing, Verizon's moving papers
 25 lacked a clear structure and contained stray accusations of wrongdoing that did not appear to
 26 constitute violations of the Modified Injunction or the Receiver Order. The Court noted that in
 the context of a motion for civil contempt, this lack of clarity at a minimum raised questions with
 27 respect to OnlineNIC's due process rights. Compounding the general disorder was OnlineNIC's
 28 untimely filing of its opposition. Under the circumstances, the Court instructed the parties to re-
 brief the contempt issue. Verizon then filed the present set of papers, which is clear and concise,
 and which informs OnlineNIC in plain terms of the provisions of the Court's orders it is alleged
 to have violated.

1 3. Transfer of approximately 250 domain names as to which pending transfer requests had
2 been rejected by Verizon

3 4. Transfer of twenty-nine domain names as to which no transfer request ever was sent to
4 Verizon

5 5. Failure to submit “whois” data for at least 122 domain name transfer requests

6 6. Failure timely to report transfer requests to Verizon

7 7. Submission of sworn certificates regarding the identity of various registrants, when in
8 fact OnlineNIC had no knowledge of their identity

9 8. Cancellation of domain name transfers approved by Verizon

10 Verizon claims that OnlineNIC also is guilty of the following violations of the Receiver
11 Order:

12 9. Failure to produce documents to Verizon in their native electronic format

13 10. Failure timely to produce other documents whose production was ordered by the
14 Court

15 11. Failure to produce the daily transfer logs for all of the domain names transferred from
16 OnlineNIC to other registrants between August 1, 2008 and March 14, 2009.

17 **B. Legal standard for civil contempt**

18 To hold a party in contempt, a court must find by clear and convincing evidence that the
19 party violated a specific and definite order and that it had sufficient notice of its terms and the
20 fact that it would be sanctioned if it did not comply. *See In re Dyer*, 322 F.3d 1178, 1190-91 (9th
21 Cir. 2003) (“The standard for finding a party in civil contempt is well settled: The moving party
22 has the burden of showing by clear and convincing evidence that the contemnors violated a
23 specific and definite order of the court.”). “In civil contempt proceedings[,] the contempt need
24 not be willful.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

25 **C. Discussion**

26 **1. Submission of Modified Injunction to ICANN**

27 In order to undo a series of apparently improper domain name transfers from OnlineNIC
28 to its parent 35 Technology LTD, the Modified Injunction contained the following requirement:

1 “[W]ithin one day of entry of this Modified Injunction, OnlineNIC shall submit this Modified
 2 Injunction to ICANN and request that all such transfers be undone in accordance with Section 6
 3 of the ICANN Policy on Transfer of Registrations between Registrars.” Modified Injunction, at
 4 4:7-10. Because the Modified Injunction was entered on May 13, 2009, OnlineNIC was required
 5 to submit the Modified Injunction to ICANN by May 14, 2009. However, it is undisputed that
 6 OnlineNIC did not do so until June 22, 2009.³ OnlineNIC now argues that its failure timely to
 7 submit the Modified Injunction to ICANN should be excused because compliance with the
 8 Modified Injunction in effect would have been futile. Specifically, OnlineNIC points out that
 9 ICANN has no power to transfer domain names, a task that may be accomplished only with the
 10 aid of a registry operator such as VeriSign.

11 OnlineNIC’s “excuse” is problematic for several reasons. First, a party may not disregard
 12 the clear terms of a court order, even if that party believes the order to be misguided, mistaken, or
 13 otherwise incorrect. *See, e.g., Chapman v. Pac. Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir.
 14 1979) (“An attorney who believes a court order is erroneous is not relieved of the duty to obey
 15 it.”); *Nasco, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 121 (W.D. La. 1984)
 16 (noting that an “[o]rder must be obeyed and cannot be ignored unless it is withdrawn or
 17 vacated”). Thus, OnlineNIC was not at liberty to disregard the express terms of the Modified
 18 Injunction, even if compliance with those terms would not have resulted in the desired domain
 19 name transfers.⁴

20 Second, while the Court would be well inclined to forgive OnlineNIC’s failure to comply
 21 with an apparently pointless requirement if there were clear evidence that OnlineNIC instead
 22 diligently attempted to achieve meaningful compliance, the record does not indicate clearly that
 23

24 ³ Perhaps not coincidentally, that date coincided with the deadline for OnlineNIC’s
 25 opposition to Verizon’s motion for contempt, which was based, *inter alia*, on OnlineNIC’s failure
 26 to submit the Modified Injunction to ICANN.

27 ⁴ OnlineNIC’s claim that compliance with the terms of the Modified Injunction was
 28 impossible—and its silence and inaction in the face of that purported impossibility—is particularly
 odd given that OnlineNIC proposed the subject provision of the injunction.

1 OnlineNIC acted with such diligence. OnlineNIC submitted the Modified Injunction to VeriSign
 2 on May 18, 2009. However, despite VeriSign's belief—conveyed in a letter to defense counsel on
 3 June 11, 2009—that the Modified Injunction did not require the transfer of any domain names,⁵
 4 defense counsel took no further action until July 1, 2009.

5 Despite its difficulty in accepting OnlineNIC's conduct, the Court will give OnlineNIC
 6 the benefit of the doubt with respect to whether OnlineNIC diligently attempted to achieve
 7 meaningful compliance with the Modified Injunction. Counsel for OnlineNIC claims that he did
 8 not receive VeriSign's letter until early July because he was out of the country. *See* Second
 9 Narancic Decl., Ex. A. While compliance with the Court's orders was not to be solely at
 10 counsel's pleasure or convenience, VeriSign did send the letter by conventional mail, apparently
 11 without providing any other form of notification, and counsel's delay is in some measure
 12 attributable to the relative inefficiency and inherent limitations of paper-based communication.
 13 Because there is *some* evidence that OnlineNIC did attempt to comply with the underlying
 14 purpose of the Court's order in a meaningful way, no sanctions will be imposed for this violation.

15 **2. Failure to submit the Modified Injunction or other transfer instructions to**
 16 **VeriSign**

17 As already noted, the Modified Injunction states that “within one day of entry of this
 18 Modified Injunction, OnlineNIC shall submit this Modified Injunction to ICANN and request
 19 that all such transfers be undone in accordance with Section 6 of the ICANN Policy on Transfer
 20 of Registrations between Registrars.” Modified Injunction, at 4:7-10. To undo a transfer,
 21 Section 6 of ICANN's Policy requires that the relevant registry operator—here, VeriSign—be
 22 provided with a copy of a court order undoing a domain name transfer. Verizon reads the
 23 injunction as containing a requirement that OnlineNIC submit the Modified Injunction to
 24 VeriSign by May 14, 2009, which OnlineNIC did not do.

25
 26 ⁵ VeriSign informed counsel that it was “in receipt of [his] letter dated May 18, 2009[,] . .
 27 . [and] ha[d] reviewed the Modified Injunction dated May 13, 2009[,] . . . [but that] [it] d[id] not
 28 appear that VeriSign [was] directed to take any action at this time.” Second Supp. Steele Decl., ¶
 3 & Ex. 2. VeriSign directed counsel to “let [VeriSign] know” if he disagreed. *Id.*

On its face, the Modified Injunction makes no reference to VeriSign, and there is some ambiguity as to whether it contains a deadline for submission to the relevant registry operator(s). Specifically, while the Modified Injunction requires that it be submitted in copy to *ICANN* within one day of its issuance, it is not clear whether the related “request that all . . . transfers be undone” also must be made to the *registry operator* within one day of issuance of the Modified Injunction. To be sure, a reading that provided OnlineNIC with an open-ended mandate to follow the procedures of Section 6 at its leisure would be contrary to the express purposes of the injunction. Nonetheless, because there is ambiguity—however slight—in the language of the injunction, the Court will not sanction OnlineNIC for its apparent four-day delay in submitting the Modified Injunction to VeriSign.⁶

3. Transfer of domain names rejected by Verizon

The Modified Injunction provides that “OnlineNIC shall not transfer, release, delete or assign any domain name without the prior written approval of Verizon or the Court-appointed Receiver.” Modified Injunction, at 2:22-24. Verizon claims that OnlineNIC authorized the transfer of nearly 250 domain names despite Verizon’s express rejection of OnlineNIC’s transfer requests. OnlineNIC initially claimed that the subject transfers were the result of unintentional—and therefore excusable—error. It noted that the transfers occurred during the “early period of the Modified Injunction, when the transfer protocols were still being ‘ironed out.’” First Opp., at 5:2-4. As Verizon points out, however, the subject transfers occurred between May 31 and June 18—i.e., between eighteen and thirty-six days after the Modified Injunction was issued—and OnlineNIC cannot credibly claim that its transfer protocol still was being “ironed out” at that time. Relatedly, while OnlineNIC claims that any inference of bad faith is negated by the alleged fact that it voluntarily notified Verizon of the improper transfers, the record reflects that OnlineNIC notified Verizon of only seven of the subject transfers, and

⁶ The fact that the Modified Injunction *requires* that it be submitted in copy to registry operators like VeriSign does not undermine the significance, in the context of the first count of contempt, of counsel’s apparent attempt to achieve meaningful compliance.

1 that the rest were accomplished “surreptitiously,” as Verizon claims. *See* First Narancic Decl.,
 2 Ex. G.

3 In its opposition to Verizon’s renewed motion for contempt sanctions, OnlineNIC now
 4 argues that Verizon’s charge simply is false. The basis for this argument is unclear, resting as it
 5 does solely on defense counsel’s assertion that the relevant allegation “is false,” and his citation,
 6 without explanation, to a 183-page spreadsheet. In any event, the evidence does not support
 7 OnlineNIC’s position. As an initial matter, OnlineNIC provides no written explanation of the
 8 meaning of the spreadsheet or the manner in which it was prepared. In addition, the spreadsheet
 9 itself discloses that at least eleven domain names whose transfer was rejected by Verizon were
 10 transferred by OnlineNIC. *See* Kroll Decl., ¶ 3 & Ex. 1. Finally, the spreadsheet appears to
 11 contain false information. For example, it does not reflect the fact that Verizon rejected all of the
 12 domain name transfer requests with initiation dates of May 28, May 29, May 30, June 4, and
 13 June 12, 2009. *See* Kroll Decl., Ex. 2 (attaching emails rejecting transfer requests with the
 14 foregoing initiation dates).

15 The spreadsheet, with its inaccuracies and lack of foundation, fails to rebut the clear
 16 evidence of contempt submitted by Verizon. *See* ¶¶ 9-13, 16-50 & Exs. 6-10, 13-47. The Court
 17 accordingly finds by clear and convincing evidence that OnlineNIC violated the Modified
 18 Injunction, and it will sanction OnlineNIC in the amount of \$5,000.

19 **4. Transfer of twenty-nine domain names as to which no transfer request was sent to**
 20 **Verizon**

21 The Modified Injunction requires that OnlineNIC provide to Verizon within twenty-four
 22 hours of receipt “the registry transfer request for each proposed domain name transfer.”
 23 Modified Injunction, at 2:25-27. In addition, as noted above, the Modified Injunction further
 24 prohibits OnlineNIC from transferring any domain name identified in a pending transfer request
 25 unless Verizon has provided its written consent to the proposed transfer. Modified Injunction, at
 26 2:22-24. Verizon claims that OnlineNIC violated the Modified Injunction by transferring twenty-
 27 nine domain names that it never sent to Verizon for review. *See* Steele Decl., ¶ 51 & Ex. 48.

1 OnlineNIC apparently acknowledges this fact, but characterizes the unauthorized transfers as “a
2 small number of errors.” Second Opp., at 3:24-25.⁷

3 Were OnlineNIC guilty of only twenty-nine “errors,” the Court might be able to overlook
4 OnlineNIC’s noncompliance. However, because the “errors” form part of a much larger pattern
5 of noncompliance, *see generally supra* and *infra*, OnlineNIC’s failure to abide by the commands
6 of the Modified Injunction may not be excused. OnlineNIC will be fined \$500 for this violation
7 of the Modified Injunction.

8 **5. Failure to submit “whois” data for approximately 122 domain name transfer**
9 **requests**

10 OnlineNIC acknowledges its failure to submit “whois” data for approximately 122 domain
11 name transfer requests, but argues that this failure should be excused because “the data was [sic]
12 missing from OnlineNIC’s information technology systems due to technical problems—which is
13 common in any large-scale database deployment.” First Opp., at 5:16-19.

14 As an initial matter, OnlineNIC has provided no competent evidence—for example, in the
15 form of a declaration—in support of its contention that the relevant “whois” data were missing
16 from its database. More importantly, it is apparent that the data were not missing from
17 OnlineNIC’s database with respect to at least eighty-six domain names for which the registrant
18 was identified as “lenawoo.” The record reflects that OnlineNIC has attempted on several
19 occasions to transfer the eighty-six “lenawoo” domain names, despite the fact that “lenawoo”
20 appears to be an alias of OnlineNIC. Verizon twice rejected the transfer requests for these
21 domain names, and the Receiver, on appeal, upheld Verizon’s determination. *See Steele Dec.*, ¶¶
22 54-57 & Exs. 49-52. On June 3, 2009, OnlineNIC again requested authorization to transfer the
23 “lenawoo” domain names. In that instance, although VeriSign’s Registry Transfer Logs—which
24 OnlineNIC directly imports and provides to Verizon—listed whois data for the eighty-six domain
25

26 ⁷ Although this acknowledgment directly contradicts a representation in the Declaration
27 of Mr. Liu, who claimed that OnlineNIC *had* NACKed all of the subject transfers, *see* Liu Decl.,
28 Doc. No. 121, ¶ 3, OnlineNIC does nothing attempt to explain or excuse the apparent falsity of
the relevant statements in the Liu declaration.

1 names, OnlineNIC's two spreadsheets did not. *See* Steele Dec., ¶¶ 58 & Ex. 53. Under these
2 circumstances, the only logical conclusion is that OnlineNIC intentionally omitted the "whois"
3 data for the "lenawoo" domain names. At least as to the eighty-six "lenawoo"-registered domain
4 names, the Court finds by clear and convincing evidence that OnlineNIC intentionally withheld
5 "whois" data in violation of the Modified Injunction. OnlineNIC will be sanctioned \$5,000 for
6 this violation.

7 **6. Failure timely to submit transfer requests to Verizon**

8 The Modified Injunction requires that OnlineNIC submit to Verizon the registry transfer
9 request for each proposed domain name transfer, along with the "whois" data for the registrant of
10 each proposed domain name transfer and sworn certificates from an officer of OnlineNIC
11 regarding the registrant and the gaining registrar (i.e., the transferee or recipient of the domain
12 name). Modified Injunction, at 2-3. Verizon claims that OnlineNIC has violated the Modified
13 Injunction by failing, on "at least 12" occasions, to submit the required information within
14 twenty-four hours of receiving it, as required. *See* Steele Dec., ¶ 63 & Ex. 57.

15 OnlineNIC admits that it failed timely to provide the subject information, but argues that
16 its failure should be excused because the twenty-four hour period "is simply too short." In light
17 of the fact that OnlineNIC itself proposed the twenty-four hour period, its mere belief that the
18 period is "too short"—and its failure to notify the Court of its purported difficulties until Verizon
19 sought contempt sanctions—is not an adequate excuse. However, because the violation appears
20 not to have prejudiced Verizon, OnlineNIC will be sanctioned only \$100 for this violation of the
21 Modified Injunction.

22 More serious is OnlineNIC's failure, between May 14 and July 2, 2009, to provide
23 Verizon with the registry transfer requests from the registry operators of .org, .biz, .info, .us, and
24 .in domain names. OnlineNIC argues that it should be excused for its failure to provide the
25 registry transfer requests because "Verizon never inquired about non.com domain [sic] until the
26 very end of June." Second Opp., at 4:2-3. However, Verizon's failure to "inquire" about the
27 transfer requests did not relieve OnlineNIC of its duty to comply with the Modified Injunction.
28 OnlineNIC will be sanctioned \$5,000 for this violation of the Court's order.

7. Submission by OnlineNIC of sworn certificates regarding the identity of registrants when OnlineNIC apparently was ignorant of the registrants' identity

The Modified Injunction requires that OnlineNIC submit certifications under penalty of perjury attesting that (1) OnlineNIC is not affiliated or acting in concert with the registrant of the domain name whose transfer is sought, and (2) OnlineNIC has not communicated with that registrant in connection with the transfer. Modified Injunction, at 3:6-13. Verizon claims that OnlineNIC violated the Modified Injunction by submitting certifications under penalty of perjury for at least 286 domain name transfer requests as to which OnlineNIC had no identity data in its own database. Motion for Contempt at 15:12-18 (citing Steele Dec., ¶¶ 61-62 & Exs. 55-56).

As questionable as OnlineNIC's conduct may be, Verizon does not claim that any of OnlineNIC's certificates actually were false. Rather, Verizon claims at most that the submission of certificates with respect to unknown registrants is "another instance where OnlineNIC's sworn statements are suspect." Motion for Sanctions, at 15:21-22. While the Court agrees, Verizon has not demonstrated that OnlineNIC violated the Modified Injunction.

8. Cancellation of domain name transfers approved by Verizon

Verizon claims that OnlineNIC has violated the Modified Injunction by cancelling thousands of domain transfers that Verizon actually approved. OnlineNIC provides a series of unconvincing excuses for its admitted failure to execute the transfers following Verizon's approval, and the Court agrees with Verizon that OnlineNIC's conduct was inappropriate. However, because the Modified Injunction lacks any express requirement that OnlineNIC execute transfers that Verizon has approved, the Court discerns no sanctionable violation of the Modified Injunction.

9. Failure to produce documents in their native electronic format

The Receiver Order required OnlineNIC to provide certain documents in their native electronic format to Verizon and the Receiver by May 27, 2009. Receiver Order, at 1:24-26. Verizon claims that OnlineNIC has not produced any document in its native format, but has exported data in a selective manner. OnlineNIC does not address this claimed violation in its second opposition. In its first opposition, OnlineNIC did claim that "the fields of data that are

1 claimed to be missing are irrelevant to the Modified Injunction.” First Opp., at 7 n.2. That
 2 excuse is woefully inadequate.

3 As an initial matter, the production of the subject records in their native electronic format
 4 is required by the *Receiver Order*, not the Modified Injunction. Moreover, the omitted data
 5 include a so-called “customer level” field, which appears to relate to OnlineNIC’s relationships
 6 with its customers. That information would seem to be highly relevant to Verizon’s
 7 determination with respect to the propriety of domain name transfers. More importantly, the
 8 Receiver Order expressly requires that all records be submitted in their native electronic format.
 9 OnlineNIC’s purported adherence to its own unilaterally defined standard of “substantial
 10 compliance” is no substitute for compliance with the express terms of the Court’s orders. The
 11 Court finds by clear and convincing evidence that OnlineNIC violated the Receiver Order by
 12 producing a selective subset of data. OnlineNIC will be sanctioned \$5,000 for this violation.

13 **10. Failure timely to produce documents whose production was ordered by the**
 14 **Court**

15 Pursuant to the Receiver Order, OnlineNIC had until May 27, 2009 to produce the
 16 following categories of documents to Verizon and the Receiver: (1) “written communication
 17 between OnlineNIC . . . and the registrant or account holder relating to any request to transfer
 18 [domain names],” Receiver Order, at 2, ¶ 6; and (2) the “account data maintained by OnlineNIC
 19 for each OnlineNIC account from which a Transferred Domain was transferred,” Receiver Order,
 20 at 2, ¶4. It is undisputed that OnlineNIC did not produce the subject documents until July 9,
 21 2009, more than six weeks after the Court-ordered deadline. *See Steele Dec.*, ¶ 70. Moreover,
 22 OnlineNIC has failed to provide any excuse for its failure to produce the documents. The Court
 23 finds by clear and convincing evidence that OnlineNIC violated the Receiver Order in this
 24 regard, and it concludes that a sanction in the amount of \$5,000 is warranted.

25 **11. Failure to produce daily transfer logs for all domain names transferred from**
 26 **OnlineNIC to other registrants between August 1, 2008 and March 14, 2009**

27 The Receiver Order provided that not later than May 27, 2009, OnlineNIC was required
 28 to produce to Verizon and the Receiver “the daily transfer logs from any registry operator for

each domain name transferred from OnlineNIC to any other registrar from August 1, 2008 to March 14, 2009.” Receiver Order, at 1:24-2:2. Verizon claims that OnlineNIC violated the Receiver Order by failing to produce the daily transfer logs from the registry operators of .org, .biz, .info, .us and .mobi domain names. OnlineNIC does not dispute its failure to comply with this aspect of the Receiver Order, but claims that it never had “the hardware, software and other infrastructure necessary to obtain the native transfer logs from registry operators other than VeriSign.” Liu Dec., ¶ 2. Noting that VeriSign’s registry is limited to .com and .net domain names, OnlineNIC claims that it thus was unable to obtain the native transfer logs for domain names other than .com and .net.

In response, Verizon has provided the declaration of Christopher Cowherd, who is Vice President of Research at an ICANN-certified registrar of top-level domains such as .com, .net, .org, .mobi, .info, and .biz, and who states explicitly that

[i]f a registrar has the hardware, software, and infrastructure necessary to obtain the daily transfer log files from VeriSign, . . . then that registrar also has the hardware, software, and infrastructure necessary to obtain the daily transfer log files from any registry operator.

Cowherd Decl., ¶ 13. OnlineNIC does not dispute the veracity of this statement, and the Court finds by clear and convincing evidence that OnlineNIC violated the Receiver Order by failing to produce the required documents to Verizon. OnlineNIC will be sanctioned \$5,000 for its violation of the Receiver Order.

12. Conclusion

For its violations of the Modified Injunction and Receiver Order, OnlineNIC will be sanctioned in the amount of \$30,600.00.⁸

⁸ Verizon once again has requested that recovery of its attorneys’ fees—which apparently now run to over \$600,000—be awarded as a sanction for OnlineNIC’s misconduct. Yet, while the Court has found multiple grounds for sanctions, there is no dispute that OnlineNIC has complied to some extent with the Court’s directives, and that the violations identified here, while important, do not constitute the sum-total of OnlineNIC’s efforts. “[T]he permissible level of sanctions for misconduct in litigation . . . is . . . limited by notions of proportionality,” *Ty Inc. v. Softbelly’s, Inc.*, 517 F.3d 494, 499 (7th Cir. 2008); *see also Zambrano v. City of Tustin*, 885 F.2d 1473, 1480 (9th Cir. 1989), and to award sanctions anywhere within the numerical realm

II. MOTION FOR RELIEF FROM JUDGMENT

A. Background

Verizon filed its complaint in the instant action on June 6, 2008. From that time until December 2008, Verizon attempted unsuccessfully to serve OnlineNIC at least thirteen different times and at five different locations. *See* Steele Decl., Doc. No. 69, ¶ 2. The majority of these attempts are cataloged in the Court's order dated November 7, 2008, authorizing Verizon to effect service through the California Secretary of State. It is undisputed that on July 17, 2008, OnlineNIC's President, Rex Liu, personally signed for an Express Mail package containing the summons and complaint. However, neither Mr. Liu nor any other representative of OnlineNIC contacted Verizon's attorneys or the Court until December 11, 2008, when Mr. Liu apparently telephoned David Steele, counsel for Verizon.

At around ten o'clock AM on December 11, 2008, Verizon filed a motion for entry of default against OnlineNIC. The clerk of the court entered the requested default on December 12, 2008. On the same day, Mr. Liu telephoned Mr. Steele and left a message. At around 5:58 PM, Mr. Liu answered a telephone call from Mr. Steele. *See* Liu Decl., ¶ 12 & Ex. D. Mr. Liu recalls informing Mr. Steele that he had just become aware of the action and needed time to retain counsel. Liu Decl., ¶ 12. Mr. Liu also recalls "stat[ing] that the allegations against OnlineNIC made by Verizon in its complaint were false." Liu Reply Decl., ¶ 1. Mr. Steele recalls that he and Mr. Liu discussed the possibility of settling the case, but that Mr. Liu informed him that OnlineNIC would not pay any substantial sum of money in settlement, and, in fact, likely would ignore the case even if an adverse judgment were entered. Steele Decl., ¶ 5.

On December 15, 2008, at 2:28 PM, Verizon filed a motion for default judgment against OnlineNIC. At 8:56 PM, Mr. Liu sent Verizon's counsel an email setting forth a number of reasons why OnlineNIC believed it had not committed the violations alleged in the complaint. However, OnlineNIC still did not appear before the Court. The motion for default judgment was

urged by Verizon would be highly disproportionate to the harm that Verizon has suffered as a result of OnlineNIC's contemptuous conduct.

heard on December 19, 2008, and the Court granted the motion on the same day. After retaining counsel, OnlineNIC filed the instant motion for relief from judgment on February 24, 2009.

B. Legal standard for relief from judgment pursuant to Rule 60

A court may grant relief from a default judgment pursuant to Federal Rule of Civil Procedure 60(b)(1) in cases of “mistake, inadvertence, surprise, or excusable neglect” The standard for determining whether there has been excusable neglect was set forth in *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984):

- (1) whether Defendant engaged in culpable conduct that led to the default;
- (2) whether Defendant had a meritorious defense; or
- (3) whether reopening the default judgment would prejudice Plaintiff.

(the “*Falk* factors”). A party’s conduct may be considered culpable if that party “received actual or constructive notice of the filing of the action and *intentionally* failed to answer.” *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001) (emphasis in original). However,

[n]eglectful failure to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process is not “intentional” under our default cases, and is therefore not necessarily—although it certainly may be, once the equitable factors are considered—culpable or inexcusable.

TCI, 244 F.3d at 698-99. Ninth Circuit precedent establishes that the *Falk* factors are disjunctive, meaning that if evidence of one factor is present, a court is under no obligation to consider evidence with respect to the other factors. *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004); *Am. Ass’n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000).⁹

⁹ While the court in *E. & J. Gallo Winery v. Cantine Rallo, S.p.A.*, 430 F. Supp. 2d 1064, 1085 (E.D. Cal. 2005) questioned the Ninth Circuit’s express holdings in *Franchise Holding II* and *Hayhurst* that the *Falk* factors are to be read disjunctively, *see E. & J. Gallo*, 430 F. Supp. at 1086-87, this Court is unpersuaded that those cases should not control. The *E. & J. Gallo* court noted the above-quoted statement in *TCI* that

[n]eglectful failure to answer as to which the defendant offers a credible, good faith explanation . . . is not “intentional” under our default cases, and is therefore not necessarily—although it certainly may be, *once the equitable factors are considered*—culpable or inexcusable.

Id. at 1085-86 (quoting *TCI*, 244 F.3d at 698-99) (emphasis added). The court focused on the

A default judgment also must be set aside as void for lack of personal jurisdiction if the defendant has not received adequate service of process. *See* Fed. R. Civ. P. 60(b)(4); *see also* *E.C. v. Internet Solutions for Business Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007); *E. & J. Gallo*, 430 F. Supp. 2d at 1085. Once a party has “appeared” for purposes of Rule 55’s entry-of-default provisions, “[t]he court must be satisfied that [the party] has received notice” of a motion for default judgment. *D.B v. Bloom*, 896 F. Supp. 166, 170 (D.N.J. 1995).

C. Discussion

1. “Excusable neglect”: the *Falk* factors

a. Culpable conduct

To excuse the five-month delay between the time OnlineNIC received actual notice of this litigation and the time it finally appeared, Mr. Liu claims that (1) he forgot about and therefore failed to open the package containing the complaint and summons, and (2) he and OnlineNIC have a poor understanding of the U.S. legal system. Verizon counters, in essence, that “Mr. Liu and OnlineNIC sat on their hands and waited to see how Verizon’s service, litigation, and collection efforts were proceeding” before deciding to appear in the litigation. Opp. to Mot. for Relief, at 1:14-16. In determining whether OnlineNIC’s justifications constitute

italicized portion of the quoted language, reading it as a suggestion that equitable balancing of each *Falk* factor was required, and suggesting that the Ninth Circuit’s subsequent *en banc* decision in *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) confirmed the necessity of such an “equitable” approach.

Aside from the fact that it has not overruled the clear holdings of *Franchise Holding II* or *Hayhurst* with respect to the disjunctive nature of the *Falk* factors, the court of appeals has continued, after *Pincay*, to follow the approach of *Franchise Holding II* and *Hayhurst*. *See, e.g., Coomes v. Shamji*, 260 Fed. Appx. 988, 989 (9th Cir. 2007) (“In light of Shamji’s culpable conduct, it is not necessary to consider whether he had any meritorious defenses.” (citing *Franchise Holding II*, 375 F.3d at 926)); *Mood v. Global Diamond Resources, Inc.*, 125 Fed. Appx. 113, 114 (9th Cir. 2005) (“[T]he ‘[good cause] factors are disjunctive,’ and, therefore, ‘the district court was free to deny the motion ‘if any of the three factors was true.’”) (quoting *Franchise Holding II*, 375 F.3d at 926)); *see also* Fed. R. App. P. 32.1 (barring prohibitions or restrictions on the citation of federal judicial opinions issued on or after January 1, 2007); 9th Cir. R. 36-6(b) (implementing Fed. R. App. P. 32.1); 9th Cir. R. 36-6(c)(ii) (permitting citation to unpublished decisions issued before January 1, 2007 “for factual purposes”). Accordingly, this Court will read the *Falk* factors disjunctively.

1 “credible, good faith explanation[s] negating any intention to take advantage of the opposing
 2 party, interfere with judicial decisionmaking, or otherwise manipulate the legal process,” the
 3 Court must consider both the circumstances surrounding OnlineNIC’s default and the credibility
 4 of Mr. Liu, who is OnlineNIC’s sole non-legal advocate in the instant proceedings.

5 The circumstances surrounding OnlineNIC’s default do not suggest the existence of a
 6 credible, good-faith excuse for OnlineNIC’s failure to respond. Principally, OnlineNIC provided
 7 a series of inconsistent, confusing, and, in every case, false addresses, both for ordinary business
 8 communications and service of process. This included maintaining false information with the
 9 California Secretary of State, in violation of California law. *See* Cal. Corp. Code § 1502(e)
 10 (requiring corporations to file with Secretary of State a current statement of address whenever
 11 address is changed). Specifically, at the time the complaint was filed, and over the course of
 12 Verizon’s multiple attempts at service, the records lodged by OnlineNIC with the Secretary of
 13 State indicated that OnlineNIC’s principal business offices and its agent for service of process
 14 were located at 2315 26th Ave., San Francisco, California (the “San Francisco Address”). Yet,
 15 as OnlineNIC admits, *see* Liu Reply Decl., Doc. No. 65, ¶ 3, the San Francisco address was not
 16 valid for either purpose as of June 2008 because neither OnlineNIC nor Mr. Liu conducted
 17 business or resided there. OnlineNIC has provided no credible, good-faith justification for its
 18 abject failure to provide for effective service of process, and that failure alone constitutes
 19 culpable conduct. *See, e.g., Employee Painters’ Trust v. Ethan Enterprises, Inc.*, 480 F.3d 993,
 20 1000 (9th Cir. 2007) (“[A] deliberate failure [to respond, sufficient to justify denial of relief from
 21 a default judgment,] can be found where, as here, defendants provide the opposing party with an
 22 incorrect address, thereby precluding normal service of process.”); *Pena v. Seguros La*
 23 *Commercial*, 770 F.2d 811, 815 (9th Cir. 1985) (finding sufficient grounds for denial of relief
 24 from default judgment where the defendant “provided both Pena and the Arizona Department of
 25 Insurance with the incorrect address, [which was the defendant’s] own fault”).

26 Further, OnlineNIC listed 3435 Wilshire Boulevard, Los Angeles, California (the “Los
 27 Angeles Address”) as its principal business address. Chu Decl., Ex. B. Yet OnlineNIC did not
 28 conduct any business or maintain an office at the Los Angeles Address. Chu Dec., ¶¶ 5-6. By

1 identifying the Los Angeles Address in its corporate filings, OnlineNIC is similarly culpable.
 2 *Pena*, 770 F.2d at 815. Finally, OnlineNIC is culpable because its website listed 351
 3 Embarcadero E., Oakland, California (the “Oakland Address”) as its mailing address. *See Chu*
 4 Decl., ¶ 8 & Ex. C. Yet, when Verizon attempted in-person service on OnlineNIC at the Oakland
 5 Address in June 2008, an employee at the business located there informed Verizon’s process
 6 server that OnlineNIC did not conduct business at that address. Smith Decl., ¶ 7. Indeed, even
 7 though OnlineNIC changed its corporate records in November 2008 to identify the Oakland
 8 Address as both its business address and the location of its agent for service of process, Steele
 9 Decl., ¶ 3 & Ex. A, OnlineNIC admits that the Oakland Address also was unsuitable for service.
 10 Liu Decl., ¶ 10. On balance, the most reasonable inference to be drawn from this state of affairs
 11 is that OnlineNIC was consciously engaged in a shell game with Verizon and other potential
 12 litigants.

13 With respect to the credibility of Mr. Liu, the Court carefully has reviewed Mr. Liu’s
 14 declarations, and has reflected on its observations in presiding over this case during the
 15 approximately seven months since Mr. Liu and OnlineNIC began to participate in the instant
 16 litigation. On the basis of that review and reflection, the Court finds that Mr. Liu simply is not a
 17 credible declarant, and that his justifications and excuses are not entitled to substantial weight.
 18 Not only has Mr. Liu on multiple occasions filed declarations that contain demonstrably false
 19 statements, but the timing of these statements suggests anything but good faith. With respect to
 20 whether he received actual notice of this lawsuit, Mr. Liu first claimed that he relied on his
 21 daughter to give him OnlineNIC’s mail and that he never received notice of the suit. Liu Decl., ¶
 22 3. However, after Verizon submitted evidence that Mr. Liu personally signed for the Express
 23 Mail package containing the summons and complaint, Mr. Liu admitted that he received those
 24 documents in July 2008. Liu Reply Decl., Doc. 65, ¶ 1.¹⁰ Similarly, Mr. Liu made false
 25

26 ¹⁰ Even if Mr. Liu’s declaration were accurate, the fact remains that OnlineNIC still had
 27 not responded to the allegations of Verizon’s complaint at the time it filed the instant motion for
 28 relief from judgment. Rather, for several months after appearing in the litigation, OnlineNIC did
 nothing while Verizon incurred litigation costs associated with its motions for default judgment,

1 representations with respect to OnlineNIC's registered addresses. Mr. Liu declared, under
 2 penalty of perjury, that "OnlineNIC's registered address for purposes of service of process during
 3 the relevant times in this action was 351 Embarcadero Avenue, Oakland, CA 94606." Liu Dec.,
 4 ¶ 3. But OnlineNIC did not update its registered address or its registered process agent's address
 5 until November 2008, around the time when the Court authorized Verizon to effect service
 6 through the Secretary of State. Steele Decl., ¶ 3, Ex. A. Mr. Liu's statement thus was false and
 7 misleading.

8 Mr. Liu also has made demonstrably false representations in recent sworn declarations
 9 filed with the Court. For example, when Verizon claimed that OnlineNIC violated the Modified
 10 Injunction by transferring twenty-nine domain names that never were sent to Verizon for review,
 11 *see* Steele Decl., ¶ 51 & Ex. 48, Mr. Liu claimed initially that OnlineNIC had sent NACK
 12 commands with respect to all of the subject transfer requests, *see* Liu Decl., ¶ 3, but he later
 13 admitted that OnlineNIC in fact had transferred the domain names at issue. Yet another example
 14 of Mr. Liu's misrepresentations concerns Verizon's claim that OnlineNIC had failed to provide
 15 "the daily transfer logs from any registry operator for each domain name transferred from
 16 OnlineNIC to any other registrar from August 1, 2008 to March 14, 2009." Receiver Order, at
 17 1:24-2:2. Verizon claimed, and OnlineNIC admitted, that the daily transfer logs from the registry
 18 operators of .org, .biz, .info, .us and .mobi domain names had not been transferred. *See supra*
 19 Section I.C.11. Irrespective of whether, as OnlineNIC claims, Verizon was required to "notify"
 20 OnlineNIC that it expected transfer logs from these domains—i.e., that it expected full compliance
 21 with the injunction—Mr. Liu's excuse—that OnlineNIC lacked "the hardware, software and other
 22 infrastructure necessary to obtain the native transfer logs from registry operators other than
 23
 24

25
 26 for an asset freeze, and to appoint a receiver, and with its efforts to enforce the judgment.
 27 OnlineNIC's failure to act until Verizon began collecting on the default judgment is further
 28 evidence of culpable conduct. *See Franchise Holding II*, 375 F.3d at 928 (finding defendant
 culpable where it "made no effort to preserve its interests in the district court until [the plaintiff]
 began collecting on the default judgment").

1 VeriSign,” which handles only .com and .net domain names, Liu Dec., ¶2—clearly was false. As
2 noted above, the Cowherd declaration states explicitly that

3 [i]f a registrar has the hardware, software, and infrastructure necessary to obtain
4 the daily transfer log files from VeriSign, . . . then that registrar also has the
5 hardware, software, and infrastructure necessary to obtain the daily transfer log
6 files from any registry operator.

7 Cowherd Decl., ¶ 13. OnlineNIC has no response to this observation, and its transparently false
8 representation in an area of its core competence is inexcusable. In sum, through his recent
9 conduct Mr. Liu has eroded severely what remaining credibility he had with the Court, and in
10 view of all the circumstances, his explanation of OnlineNIC’s failure to respond to actual notice
11 of this lawsuit cannot be considered credible or as having been made in good faith.

12 Similarly unpersuasive is Mr. Liu’s claim that his and OnlineNIC’s poor understanding of
13 the U.S. legal system should excuse OnlineNIC’s failures. As an initial matter, OnlineNIC
14 promotes itself as “a professional company . . . [w]ith extensive technical and financial resources
15 and a fully experienced staff.” Steele Decl., ¶ 8, Ex. E. OnlineNIC also is one of the fifteen
16 most active registrars at ICANN. Steele Dec., ¶ 9. More importantly, OnlineNIC incorporated
17 itself in California, has drafted numerous contracts enforceable under California law and, and
18 maintains a legal disclaimer on its website. Steele Decl., ¶¶ 10-12 & Exs. F-H. There can be
19 little doubt that OnlineNIC consulted with California lawyers and thereby became at least
20 somewhat familiar with the legal obligations of California corporations. *See Richmark Corp. v.*
21 *Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1449 (9th Cir. 1991) (observing that foreign
22 defendant revealed familiarity with U.S. legal system by retaining local counsel to protect its
23 interests in other matters). “[I]t is fair to expect that individuals who have . . . consulted with a
24 lawyer appreciate the consequences of failing to answer and do so only if they see some
25 advantage to themselves.” *TCI*, 244 F.3d at 699 n.6.

26 For all of the foregoing reasons, the Court concludes that there is no credible, good-faith
27 explanation for OnlineNIC’s failure to appear for five months after receiving actual notice of this
28 lawsuit. Accordingly, OnlineNIC has engaged in culpable conduct that weighs strongly in favor
of denying relief from the judgment entered on December 19, 2008. While this conclusion alone

warrants denial of OnlineNIC's motion for relief from judgment, *Franchise Holding II*, 375 F.3d at 926; *Hayhurst*, 227 F.3d at 1108, the Court nonetheless will offer a brief discussion of the remaining two *Falk* factors as they apply to the case at bar.

b. Meritorious defense

Even assuming that the default at issue did not result from OnlineNIC's culpable conduct, it does not appear that OnlineNIC has a meritorious defense. The facts provided by Verizon to the Court in its motion for default judgment demonstrated that OnlineNIC was both the registrant and the registrar of the 663 domain names that are identical or confusingly similar to Verizon's marks. As such, OnlineNIC does not qualify for protection under the Anticybersquatting Consumer Protection Act's ("ACPA") safe harbor provision, which exempts a domain name registrar from liability resulting from its registration of domain names for others where the registrar is acting in a purely passive capacity. 15 U.S.C. § 1114(2)(D)(iii).

In its motion to set aside the default, OnlineNIC attempts to show that it is not liable under the ACPA because it is the registrar, but not the registrant, of one of the 663 domain names that are confusingly similar to the Verizon marks. Specifically, OnlineNIC contends that the registrant of verizondialup.com is Yunfeng Xie. Liu Decl., at 5, ¶ 8a & Ex. C. This contention, however, is inconsistent with the public "whois" data for verizondialup.com, which identifies the registrant as follows:

junlong zheng lixian@35.cn +86.59211111
OnlineNIC
8F, Huiyuan Bild, 276 Jiahe Rd.
Xiamen, Fujian, CN 361012

Bradley Decl., Ex. B, at 38. While OnlineNIC argues that it "never made or confirmed th[e] statement" that "junlong zheng is OnlineNIC," Reply ISO Mot. for Relief, at 6:17-19 (citing Liu Reply Decl., ¶ 2), it also does not deny that alleged fact. In the context of a motion to set aside a judgment, the burden is on the moving party. *TCI*, 244 F.3d at 697. Thus, OnlineNIC's failure to deny alleged facts constitutes an admission of those facts for the limited purpose of determining whether OnlineNIC has made an adequate showing under any of the *Falk* factors. *Cf. Franchise Holding II*, 375 F.3d at 926 (noting that moving party "b[ears] the burden of

1 showing that any of [the *Falk*] factors favor[] setting aside the default”). Accordingly, the Court
 2 concludes that OnlineNIC does not have a meritorious defense.

3 **c. Prejudice to Verizon**

4 The Court has considered each of Verizon’s arguments with respect to the likelihood that
 5 it will suffer prejudice if the motion for relief from judgment is granted. None of these
 6 arguments is particularly convincing. For example, while Verizon claims that it will lose the
 7 ability to enforce its judgment against OnlineNIC before Yahoo!, Inc., which filed an action
 8 against OnlineNIC some six months after Verizon filed the instant action, both cases are before
 9 this Court, and the Court can ensure that Verizon’s judgment is given priority if that indeed is the
 10 proper course. In addition, while Verizon claims to have suffered prejudice in the form of
 11 attorneys’ fees expended both on attempted service of OnlineNIC and on the subsequent default
 12 proceedings, that prejudice could be cured by an order requiring OnlineNIC to pay Verizon its
 13 reasonable attorneys’ fees as a condition of setting aside the default judgment.

14 Nonetheless, even if the Court were required to balance the *Falk* factors, OnlineNIC’s
 15 conduct in connection with the default was sufficiently culpable, and its defenses to liability were
 16 sufficiently lacking in merit, that OnlineNIC still would not be entitled to relief from the
 17 December 2008 judgment. *See supra*.

18 **2. Adequacy of notice of default judgment hearing**

19 OnlineNIC also argues that the default judgment must be set aside because it did not
 20 receive actual notice of Verizon’s motion for default judgment, which was filed on December 15,
 21 2008 and heard on December 19, 2008. OnlineNIC’s argument is incorrect because (1)
 22 OnlineNIC had not “appeared” in the case, meaning that actual notice was not required, and (2)
 23 even if OnlineNIC had appeared, Verizon provided proper notice of the hearing.

24 Rule 55(b)(1), which provides for entry of default by the clerk of the court, applies only
 25 to parties who have not appeared in an action. *See Direct Mail Specialists, Inc. v. Eclat*
 26 *Computerized Techs., Inc.*, 840 F.2d 685, 689 (9th Cir. 1988). Thus, if a party has appeared, “the
 27 clerk’s entry of default is void ab initio.” *Id.* An appearance typically involves “some
 28 presentation or submission to the court.” *Id.* However, “because judgments by default are

1 disfavored, a court usually will try to find that there has been an appearance by defendant.” *Id.*
 2 (citation and internal quotation marks omitted). Accordingly, where a clear and unambiguous
 3 communication to the court is lacking, a defendant nonetheless may be found to have appeared
 4 “where it evidenced an intent to defend itself.” *Franchise Holding II*, 375 F.3d at 928.

5 OnlineNIC claims that it “appeared” in the litigation by way of the December 12, 2008
 6 telephone call with Mr. Steele. Of course, because OnlineNIC did not make its “appearance”
 7 known to the Court, the relevant question is whether OnlineNIC, in the course of the telephone
 8 conversation, “evidenced an intent to defend itself.” *Id.*; *cf. Wilson v. Moore & Assocs., Inc.*, 564
 9 F.2d 366, 367 (9th Cir. 1977) (finding that defendant had appeared where it sent a letter directly
 10 to the district court). As noted above, during the December 12 telephone conversation, Mr. Liu
 11 discussed with Mr. Steele the possibility of settling the case. However, according to Mr. Steele,
 12 Mr. Liu represented that OnlineNIC would not pay any substantial sum of money to settle the
 13 case and, in fact, likely would ignore it. Steele Decl., ¶ 5. Viewed in the light most favorable to
 14 OnlineNIC, Mr. Liu at most expressed an intent to hire an attorney. *See* Liu Decl., ¶ 12. In
 15 addition, by Mr. Steele’s account of the conversation, Mr. Liu’s comments certainly would have
 16 given the impression that OnlineNIC did not intend to defend the suit. *See* Steele Decl., ¶ 5.
 17 Indeed, it appeared that OnlineNIC was interested solely in discussing a possible settlement,
 18 which does not constitute evidence of an “intent to defend.” *See State of New York v. Green*,
 19 420 F.3d 99, 106-07 (2nd Cir. 2005) (finding that defendant had not appeared because it had not
 20 asserted any defense or identified any weakness in the substance of the lawsuit, but merely had
 21 discussed its willingness to settle).¹¹ In sum, OnlineNIC did not “appear,” and thus may not
 22 complain of the default entered against it.¹²

23
 24 ¹¹ To the extent that Mr. Liu’s and Mr. Steele’s accounts of the conversation differ, the
 25 Court will credit Mr. Steele’s account given the unfavorable credibility determination that the
 Court has reached with respect to Mr. Liu. *See supra* Section III.C.1.a.

26 ¹² OnlineNIC also claims that it made an appearance, for purposes of Rule 55, when Mr.
 27 Liu sent an email to Mr. Steele on December 15. Even assuming that the contents of the email
 28 constituted an “appearance,” the email was sent hours after Verizon had filed its notice of default
 judgment. Verizon was not required to give notice of earlier-filed documents.

Even if OnlineNIC were deemed to have appeared, the record reflects that OnlineNIC received timely and proper—if not entirely generous—notification of the default judgment hearing. On December 15, 2008, upon filing its Motion for Default Judgment, Verizon served OnlineNIC (1) at the Oakland Address—which OnlineNIC still insists “conclusively . . . was a valid address for service . . .,” Reply, at 2:4-6—by federal express and first class mail, (2) at the San Francisco Address by first class mail, and (3) by email at cs-os@onlinenic.com. Verizon thus did not “suppress” notice to OnlineNIC or conceal “its intent to pursue litigation for fear of stimulating the defendant into defending itself.” *Franchise Holding II*, 375 F.3d at 928.

III. ORDER

For the foregoing reasons, Verizon’s motion for contempt sanctions will be granted in the amount of \$30,600.00. OnlineNIC’s motion for relief from the \$33.15 million default judgment entered against it on December 19, 2008 will be denied. However, in the interest of justice, Verizon will be required to prove up its damages (including the proper per-violation amount of statutory damages) in the context of the adversarial proceeding that has arisen since OnlineNIC appeared in the litigation.¹³ The Court expressly reserves jurisdiction to modify the amount of the judgment according to proof. Counsel shall meet and confer and contact the Court’s administrative law clerk to arrange an appropriate hearing date.

IT IS SO ORDERED.

DATED: 7/27/09


JEREMY FOGEL
United States District Judge

¹³ The Court has “inherent power and . . . discretion” to impose various conditions in the context of deciding whether to grant or deny relief from a default judgment. *Powerserve Intern., Inc. v. Lavi*, 239 F.3d 508, 515 (2d Cir. 2001); 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 3d § 2700, at 170.

1 This Order has been served upon the following persons:

2 David Jefferson Steele david.steele@cph.com, djslit@cph.com

3 Gary Scott Dukarich gsd@cph.com, kristen.geraci@cph.com

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